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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/712,784	11/12/2003	Kenneth W. Stearns	MARE 3529	7791
7812	7590	01/16/2009		
SMITH-HILL AND BEDELL, P.C. 16100 NW CORNELL ROAD, SUITE 220 BEAVERTON, OR 97006			EXAMINER	RICHMAN, GLENN E
			ART UNIT	PAPER NUMBER
				3764
			MAIL DATE	DELIVERY MODE
			01/16/2009	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/712,784	<b>Applicant(s)</b> STEARNS ET AL.
	<b>Examiner</b> /Glenn Richman/	<b>Art Unit</b> 3764

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If no period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED. (35 U.S.C. § 133).

Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

1) Responsive to communication(s) filed on 29 October 2008.

2a) This action is FINAL.      2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

4) Claim(s) 21-30 is/are pending in the application.

4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5) Claim(s) \_\_\_\_\_ is/are allowed.

6) Claim(s) 21-30 is/are rejected.

7) Claim(s) \_\_\_\_\_ is/are objected to.

8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a) All    b) Some \* c) None of:

1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

1) Notice of References Cited (PTO-892)  
2) Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3) Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_

4) Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_

5) Notice of Informal Patent Application  
6) Other: \_\_\_\_\_

### **DETAILED ACTION**

The rejection from the prior office action is maintained and incorporated by reference.

#### ***Claim Rejections - 35 USC § 102***

The rejection from the prior office action is maintained and incorporated herein by reference.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 21, 28 are rejected under 35 U.S.C. 102(b) as being anticipated by McIntosh.

McIntosh discloses a frame, force receiving members linked to the frame for movement in closed paths relative to the frame (fig. 10), the force receiving members comprising an arm supporting member moved by an arm of the user and a leg supporting member moved by a leg of the user (fig. 10), resisting means for resisting movement of the force receiving members in the closed paths (abstract); displaying a first arrangement of first exercise performance data describing exercise performed by the user while the resisting means is providing a first level of resistance to movement of the force receiving members that is less than a threshold level (col. 6, lines 3 - et seq.); and displaying a second arrangement of second exercise performance data describing exercise performed by the user while the resisting means is providing a second level of

resistance to movement of the force receiving members that is greater than the threshold level (col. 6, lines 3 - et seq.), the first and second performance data arrangements are alternately displayed by displaying the first performance data arrangement while the resisting means is providing less than the threshold level of resistance to movement of the force receiving members, and by displaying the second exercise performance data arrangement when the resisting means is providing greater than the threshold level of resistance to movement of the force receiving members (col. 6, lines 3 - et seq.).

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 22-24, 26-29 are rejected under 35 U.S.C. 103(a) as being unpatentable over McIntosh.

As McIntosh discloses strength exercising, and switching the level of resistances, it would obvious to have McIntosh switch the level or resistance such the user is encouraged to perform cardio exercises, as it is well known in the art, to perform cardio and strength exercises.

McIntosh further discloses the resistance to movement of the force receiving members provided by the force resisting means is switched between the first and second levels in response to user input (col. 23, lines 40 - et seq.), the resistance to

movement of the force receiving members provided by the force resisting means is switched from the first level to the second level when the user has performed a first predetermined amount of exercise activity with the resistance set at the first level (col. 23, lines 40 - et seq.), and wherein the level of resistance to movement of the force receiving members provided by the force resisting means is switched from the second level to the first level when the user has performed a second predetermined amount of exercise activity with the resistance set at the second level (col. 23, lines 40 - et seq.), the first performance data and the second performance data arrangements are concurrently displayed (col. 6, lines 3 - et seq.), adjusting appearances of the displayed first and second performance data arrangements to indicate whether the resisting means is providing less than or greater than the threshold level of resistance to movement of the force receiving members (col. 6, lines 3 - et seq.).

As for claim 29, as McIntosh discloses programming the device for a cumulative amount of exercise to be performed by the user in a certain range (col. 32, lines 50 - et seq.), it would have been obvious to indicate a cumulative amount of exercise performed by the user providing less and providing greater than the threshold values, also as McIntosh discloses indicating the completed routine by the user (col. 6, lines 3- et seq.).

***Allowable Subject Matter***

Claims 25 and 30 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

***Response to Arguments***

Applicant's arguments filed 2/20/08 have been fully considered but they are not persuasive.

As to the applicant's arguments:

While both arrangements display performance data, the difference between the first and second arrangements recited in claims 21 and 28 relates to the level of exercise machine resistance to user effort, whereas the difference between McIntosh's blinking and non-blinking stick figure "arrangements" relates to the level of user effort. Although both display systems tell the user something about his performance, they differ with respect to how they categorize user performance.

A user viewing the "performance data" presented by the applicant's recited first and second arrangements is able to distinguish how he performed during times when resistance was low from how he performed during times when resistance was high. The applicant's two arrangements thus categorize user performance data according to the machine's resistance level at the time the effort was performed. A user viewing the "performance data" presented by the stick figure learns desired performance criteria for each body part and whether his performance currently meets those performance criteria. The stick figure thus categorizes user performance according to whether the user does or does not meet performance criteria. The stick figure does not categorize user performance data according to the machine's resistance level at the time the effort was performed.

1. In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., "A user viewing the "performance data" presented by the applicant's recited first and second arrangements is able to distinguish how he performed during times when resistance was low from how he performed during times when resistance was high. The applicant's two arrangements thus categorize user performance data according to the machine's resistance level at the time the effort was performed") are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

***Conclusion***

This is a RCE of applicant's earlier Application No. 10/712784. All claims are drawn to the same invention claimed in the earlier application and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the earlier application. Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action in this case. See MPEP § 706.07(b). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any

extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no, however, event will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Glenn Richman whose telephone number is 571-272-4981. The examiner can normally be reached on Mon-Thurs.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, LoAn Thanh can be reached on (571)272-4966. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Glenn Richman/  
Primary Examiner  
Art Unit 3764

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